

§ 85a.3 Authority for investigations of places of employment.

(a) NIOSH authorized representatives who have been issued official NIOSH credentials are authorized by the Director, NIOSH, under sections 20 and 8 of the OSH Act, sections 501 and 103 of the FMSH Act, and this part. To enter without delay any place of employment for the purpose of conducting investigations of all pertinent processes, conditions, structures, machines, apparatus, devices, equipment, and materials within the place of employment; and to conduct medical examinations, anthropometric measurements and functional tests of employees within the place of employment as may be directly related to the specific investigation being conducted. Such investigations will be conducted in a reasonable manner, during regular working hours or at other reasonable times and within reasonable limits. In connection with any investigations, such NIOSH authorized representatives may question privately any employer, owner, operator, agent, or employee from the place of employment; and review, abstract, or duplicate employment records, medical records, records required by the Act and regulations, and other related records. In those instances where systems of records subject to review, abstraction or duplication are of a confidential nature, such as medical records, and are abstracted or duplicated, NIOSH will maintain such systems in accordance with the Privacy Act of 1974 (5 U.S.C. 552a) and the implementing regulation of the Department of Health and Human Services (45 CFR part 5b).

(b) Areas under investigation which contain information classified by any agency of the United States Government in the interest of national security will be investigated only by NIOSH authorized representatives who have obtained the appropriate security clearance and authorization.

[41 FR 45002, Oct. 14, 1976, as amended at 45 FR 2654, Jan. 14, 1980]

§ 85a.4 Procedures for initiating investigations of places of employment.

(a) Except as otherwise provided in paragraph (b) of this section, NIOSH authorized representatives will contact

an official representative of the place of employment prior to any site visits and will provide the details of why an investigation of the place of employment is being conducted. Prior to the initiation of a site visit of a place of employment, representatives of the following organizations will be advised of the site visit and the reason for its conduct:

(1) The appropriate State agency designated under section 18(b) of the OSH Act, or if no State agency has been designated under the OSH Act and in the case of the FMSH Act, the State agency which, in the judgment of NIOSH, would benefit the most from the investigation's findings;

(2) If there is a local union at the place of employment, the local president, business manager or other appropriate individual;

(3) The appropriate Assistant Regional Director, when investigations are conducted under the OSH Act;

(4) The appropriate MSHA District Office; the Director, BOM, and the Assistant Director for Mining, BOM, when investigations are conducted under the FMSH Act.

(b) Advance notice of site visits will not be given to the place of employment or local union at the place of employment when, in the judgment of the NIOSH authorized representatives, giving such notice would adversely affect the validity and effectiveness of an investigation. Those individuals and organizations specified in § 85a.4(a)(1), (a)(3) and (a)(4) will be notified prior to the initiation of such a site visit. After the site visit has been initiated, and, as soon as possible thereafter, the NIOSH authorized representatives will contact those individuals specified in § 85a.4(a)(2) concerning the nature and details of the site visit.

(c) In those instances where site visits are not necessary to the conduct of an investigation, the NIOSH authorized representatives will contact an official representative of the place of employment either verbally or through a written communication and provide the details of why an investigation of the place of employment is being conducted. If appropriate, the NIOSH authorized representatives will contact

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those individuals stipulated in paragraphs (a)(1), (a)(2), (a)(3), and (a)(4) of this section about the nature and details of the investigation.

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§ 85a.5 Conduct of investigations of places of employment.

(a)(1) Prior to beginning a site visit, NIOSH authorized representatives will present their credentials to the employer, owner, operator or agent in charge at the place of employment, explain the nature, purpose and scope of the investigation and the records specified in § 85a.3 which they wish to review, abstract or duplicate.

(2) In those instances where site visits are not necessary to the conduct of an investigation and the initial contact is made verbally, NIOSH authorized representatives will, at the request of the employer, owner, operator or agent in charge at the place of employment, provide a written explanation of the nature, purpose and scope of the investigation and the records specified in § 85a.3 which they wish to review, abstract or duplicate.

(b)(1) At the commencement of an investigation, the employer, owner, operator or agent in charge at the place of employment shall precisely identify that information which is trade secret and might be seen or obtained by the NIOSH authorized representatives during the investigation. If the NIOSH authorized representatives have no clear reason to question such identification, such information will not be disclosed by NIOSH in accordance with the provisions of section 15 of the OSH Act. Generally, NIOSH will not question trade secret designations; however, if NIOSH at any time does question such identification, not less than 15 days' notice to the employer, owner, operator or agent will be given of the intention to remove the trade secret designation from such information. The employer, owner, operator or agent may within that period submit a request to the Director, NIOSH, to reconsider this intention and may provide additional information in support of the trade secret designation. The Director, NIOSH, will notify the employer, owner, operator or agent in

writing of the decision which will become effective no sooner than 15 days after the date of such notice.

(2) In those instances where the NIOSH authorized representative is a person fulfilling a contact agreement with NIOSH or is serving as an expert or consultant to NIOSH pursuant to the Act, the employer, owner, operator or agent in charge at the place of employment may, after advising the NIOSH contractor or consultant in writing, elect to withhold information deemed to be a trade secret from such a NIOSH authorized representative or prohibit entry into the area of the place of employment where such entry will reveal trade secrets. In those instances, where the subject information is needed or access to the area of the place of employment is necessary, in the judgment of NIOSH, to fulfill the goals of the investigation, NIOSH regular employees will then obtain the information or enter the subject area of the place of employment.

(c)(1) NIOSH authorized representatives will be in charge of site visits conducted pursuant to this part.

(2) Where there is a request by the representative of the State agency and/or employees, who were notified pursuant to § 85a.4(a)(1) or § 85a.4(a)(2) to accompany the NIOSH authorized representatives during the site visit of the place of employment, the NIOSH authorized representatives will allow this request if they determine that this will aid the investigation; or where, in the judgment of the NIOSH authorized representatives, good cause has been shown why accompaniment by a third party who is not an employee of the employer is reasonably necessary to the conduct of an effective and thorough site visit, they may permit such third party to accompany them during the site visit: *Provided however*, That access by such person(s) to areas described in § 85a.5(c)(4) shall be in accordance with the requirements of such provision and access to areas containing trade secrets shall be with the consent of the employer, owner, operator or agent in charge at the place of employment.

(3) NIOSH authorized representatives are authorized to deny the right of accompaniment under this paragraph to